U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0099

BARBARA CURRAN (widow of RICHARD CURRAN) Claimant-Respondent v. THORPE INSULATION CORPORATION and PACIFIC INDEMNITY c/o CHUBB GROUP OF INSURANCE COMPANIES Employer/Carrier-Petitioners and OWENS-CORNING FIBERGLASS CORPORATION and TRAVELERS CASUALTY AND SURETY COMPANY Employer/Carrier-Respondents and THERMAL SERVICES and SAIF CORPORATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: Nov. 10, 2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and Lior A. Brinn (Brayton & Purcell, L.L.P.), Novato, California, for claimant.

Bill Parrish (Law Office of Bill Parrish), San Francisco, California, for Thorpe Insulation and Chubb Group.

Michael W. Thomas and Greg Gruzman (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for Owens-Corning and Travelers.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for Thermal Services and SAIF Corporation.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Thorpe Insulation appeals the Decision and Order Awarding Benefits (2014-LHC-01347, 2014-LHC-01348) of Administrative Law Judge Christopher Larsen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked as an insulator for over 35 years. He died due to asbestos-related disease on July 19, 2012. His widow, claimant, filed a claim for death benefits under the Act against three of decedent's former employers: Thermal Services (employed 1994-1997); Owens-Corning (employed 1969-1983); and Thorpe Insulation (employed 1963-1981). 33 U.S.C. §909. Claimant alleged decedent was exposed to asbestos when he worked on a covered maritime situs with each employer.

Following the steps set forth in *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), the administrative law judge addressed the claim. He commenced his analysis by determining that claimant did not establish a prima

facie case relating decedent's disease and death to the most recent employment with Thermal because she failed to establish decedent had asbestos exposure on a covered situs. Decision and Order at 10-11. Thus, the administrative law judge found that Thermal is not the responsible employer. Next, the administrative law judge made a similar finding with respect to decedent's work at Owens-Corning. Although evidence demonstrated decedent worked on the *Queen Mary* for Owens-Corning, no evidence establishes either working conditions that could have exposed him to asbestos or his actual exposure to asbestos on that ship. *Id.* at 14-16. Accordingly, the administrative law judge found that Owens-Corning is not the responsible employer. Addressing decedent's employment with Thorpe, the administrative law judge found that decedent's uncontradicted deposition testimony establishes he was exposed to asbestos at the Todd and Bethlehem shipyards while working for Thorpe. The administrative law judge inferred from decedent's testimony that the exposure was not minimal, and, with no evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption, he held Thorpe liable for claimant's benefits. Decision and Order at 17. Based on the parties' stipulations, the administrative law judge awarded claimant death benefits based on an average weekly wage of $647.50 and funeral expenses of $1,832.62. *Id.*; *see* 33 U.S.C. §909.

Thorpe appeals the administrative law judge's finding that it is the responsible employer. Thorpe challenges both the administrative law judge's application of Section 20(a), 33 U.S.C. §920(a), in light of the parties' stipulation that the Act applies to this claim, and his finding that Owens-Corning is not the responsible employer.[1] Owens-Corning responds, urging the Board to reject Thorpe's contentions and affirm the administrative law judge's decision. Claimant responds, arguing there was no impropriety in the administrative law judge's finding against Thorpe, but adding that she submitted sufficient evidence to invoke the Section 20(a) presumption against Owens-Corning and Thermal. In any event, claimant urges the Board to affirm her award of benefits.[2] Thermal responds, asserting that Thorpe did not challenge the finding that Thermal is not the responsible employer, and that finding should be affirmed. On whether Owens-Corning should be held liable instead of Thorpe, Thermal takes no position. The Director, Office of Workers' Compensation Programs (the Director),

[1] Thorpe does not challenge claimant's entitlement to benefits, the amount of the benefits awarded, or the finding that Thermal is not the responsible employer.

[2] In an Order dated June 16, 2015, the Board granted Thermal's motion to dismiss as interlocutory claimant's appeal of the administrative law judge's order stating that the employer responsible for claimant's benefits would be entitled to a credit under Section 3(e) of the Act, 33 U.S.C. §903(e). Claimant did not renew her challenge after the administrative law judge issued his final decision.

responds in partial agreement with Thorpe. The Director urges the Board to vacate the finding that Thorpe is the responsible employer and to remand the case for the administrative law judge to apply the *Albina Engine* test properly, as there appears to be evidence sufficient to invoke the Section 20(a) presumption against Owens-Corning. Owens-Corning responds to both claimant and the Director, refuting their assertions that claimant presented sufficient evidence to invoke the Section 20(a) presumption against it.[3]

Initially, we reject Thorpe's argument that the administrative law judge ignored the parties' stipulation that the Act applies to this case. Thorpe asserts that, by this stipulation, Owens-Corning conceded the issues of status, situs, and liability, and should be held liable as the later employer. Contrary to Thorpe's contention, a stipulation that the Act applies to a claim does not necessarily mean that the employers conceded liability or relinquished any of their defenses to liability. Rather, as Owens-Corning asserts, the parties agreed that the provisions of the Act are to be used to determine the claimant's entitlement to benefits and which employer is responsible for those benefits. *See Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982) (subject matter jurisdiction not the same as coverage); *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981) (subject matter jurisdiction not the same as coverage); *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997) (parties cannot stipulate to coverage). As the administrative law judge found, all employers, including Thorpe, considered situs to be at issue while the case was before him, Decision and Order at 4 n.3, and therefore the administrative law judge did not err in addressing causation/situs to determine the compensability of the claim as to each employer in this case.

Next, Thorpe contends the administrative law judge erred in his application of the *Albina Engine* test against Owens-Corning.[4] Thorpe asserts there is sufficient evidence

[3] The Board granted Owens-Corning's request for leave to respond to both claimant's brief and the Director's brief. Order (Sept. 9, 2016). Owens-Corning filed one brief, dated September 26, 2016, containing both responses, which we accept as part of the record. 20 C.F.R. §802.215.

[4] In light of the briefing, there appears to be no dispute that decedent worked on at least one maritime situs while employed with each employer. Decedent worked on a ship sometime in the 1990s for Thermal; he worked on the *Queen Mary* sometime in the 1970s for Owens-Corning; and he worked at two shipyards while working for Thorpe. Thus, situs under the Act, 33 U.S.C. §903(a), is not a separately disputed issue. The issue is whether the administrative law judge properly determined if, in addition to his undisputed exposure to asbestos at non-maritime sites, decedent was exposed to asbestos

of record to invoke the Section 20(a) presumption against Owens-Corning and that Owens-Corning cannot rebut the presumption; thus, Owens-Corning should be held liable. The Director asserts that claimant established "'some' evidence of working conditions aboard the *Queen Mary* that *could* have resulted" in decedent's disease and, thus, she established the working conditions element of her prima facie case. Dir. Br. at 5 (emphasis in original). The Director urges the Board to vacate the finding against Thorpe and to remand the case for further consideration. We reject these arguments, as the administrative law judge properly applied *Albina Engine* and his conclusions are rational and supported by substantial evidence.

In *Albina Engine*, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held:

> [T]he ALJ in multiple-employer occupational disease cases should conduct a sequential analysis, as follows: the ALJ should consider *sequentially*, starting with the last employer, (1) whether the § 20(a) presumption has been invoked successfully against that employer, (2) whether that employer has presented substantial, specific and comprehensive evidence so as to rebut the § 20(a) presumption, *see* [*Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1998)],[5] and (3) if the answer to the second question is yes, whether a

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while working on maritime sites. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

[5] Here, the Ninth Circuit noted:

> The presumption may be rebutted not only with substantial evidence that the claimant was not harmed by injurious stimuli at that employer, but also with substantial evidence that the claimant was exposed to injurious stimuli at a subsequent covered employer. *See* [*Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 5-6, 33 BRBS 162, 165(CRT) (1st Cir. 1999)]. As a practical matter, though, in the sequential analysis described here, the latter method of rebuttal is likely to be available only to an employer who seeks to show that a covered employer who is not claimed against in that proceeding is actually responsible for the claimant's injury, because, if substantial evidence exists of exposure by a later employer who is part of the same proceeding, then the analysis probably would have stopped at that later employer.

Albina Engine, 627 F.3d at 1302 n.3, 44 BRBS at 93-94(CRT) n.3.

> preponderance of the evidence supports a finding that that employer is responsible for the claimant's injury, *see* [*Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700, 14 BRBS 538, 544 (2d Cir. 1982)]. The first employer in the analytical sequence (that is, the last employer in time) who is found to be responsible under this analysis shall be liable for payment of benefits, and the ALJ need not continue with this analysis for the remaining employers. In conducting this analysis, the ALJ should consider all evidence regarding exposure or lack thereof at a particular employer, and evidence supporting a finding of exposure at a given employer may be submitted either by the claimant or by earlier employers.

Albina Engine, 627 F.3d at 1302, 44 BRBS at 93-94(CRT) (emphasis in original). Thus, the test for ascertaining the responsible employer in an occupational disease case correlates to that of compensability under Section 20(a).

In determining whether an injury is compensable, that is, work-related, a claimant is aided by the Section 20(a) presumption which is invoked only after she establishes decedent sustained a harm and conditions existed or an accident occurred at his place of employment which could have caused the harm. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In applying this law, Thorpe asserts that claimant presented sufficient evidence to invoke the Section 20(a) presumption against Owens-Corning, and the administrative law judge erred by requiring claimant to bear a heavier burden than is necessary to invoke the presumption. The Director agrees, asserting that claimant, to invoke the presumption, is not required to "'conclusively establish' that her husband was actually exposed to asbestos while working for with [sic] Owens-Corning. . . ; rather, she needed only to present 'some' evidence of working conditions aboard the *Queen Mary* that *could* have resulted in the employee's asbestos-related lung diseases." Dir. Br. at 5 (emphasis in original). In response to the Director, Owens-Corning argues that asbestos exposure is the necessary "working condition" in this case, that the standard for invocation is not "showing that working conditions could have existed that could have caused" decedent's disease, and that the administrative law judge properly applied the law in this case. Owens-Corning Resp. Br. at 6 (emphasis in original).

In *Albina Engine*, the court cited as "s*ome* admissible evidence of asbestos exposure" the deposition testimony of a former Owens-Corning employee regarding the storage of asbestos-containing material at the facility when the decedent worked there, the deposition testimony from the decedent's former wife that he came home dusty, the testimony from a doctor regarding the decedent's statements about his asbestos exposure,

and the testimony of the claimant-widow about what the decedent had said to her. The administrative law judge credited this evidence. The Ninth Circuit affirmed, stating that the former employee's testimony "constituted reasonable circumstantial evidence of exposure," and, in addition to the decedent's deposition testimony about his exposure to asbestos, was sufficient to invoke the Section 20(a) presumption. *Albina Engine*, 627 F.3d at 1303, 44 BRBS at 94(CRT); *see Ramey*, 134 F.3d at 960, 31 BRBS at 210(CRT).

Here, however, having undisputedly established a harm, decedent's asbestos-related death, *see* CX 40, claimant presented the following to establish the working conditions element with respect to Owens-Corning: 1) decedent's depositions;[6] 2) claimant's deposition; and 3) Charles Ay's hearing testimony.[7] Decedent testified in his June 2011 deposition that he worked on the *Queen Mary* in the 1970s for Owens-Corning and that he worked on a second unnamed ship shortly thereafter, also while with Owens-Corning.[8] CX 43 at 222-223. Decedent did not make any statements about being exposed to asbestos while on the *Queen Mary*. In her deposition, claimant stated that decedent worked on the *Queen Mary* when he worked for Owens-Corning, decedent at some point told her what he did there but she cannot remember any details, she has no pictures of his work on the *Queen Mary*, and she does not have any information about whether he was exposed to asbestos while he worked there. CX 6 at 41, 46.[9]

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[6] Decedent's depositions, dated February 25, 2011, June 17, 2011, and January 25, 2012, are in the record. The February 2011 and January 2012 depositions do not mention the *Queen Mary* but instead focus on decedent's work with Thorpe and Thermal.

[7] In a post-hearing Order Granting Motion to Strike, dated August 11, 2015, the administrative law judge struck "from the record any opinion testimony from Mr. Ay, including supporting exhibits," due to claimant's failure to disclose Mr. Ay as an expert witness in accordance with the administrative law judge's pre-hearing order. Order Granting Motion to Strike at 9. The administrative law judge stated that, "[t]o the extent [Mr. Ay] testifies of his own personal knowledge as a percipient witness, I allow his testimony." *Id*.

[8] The administrative law judge rationally declined to address the second ship because no party could name the ship, when decedent worked on it, what he did thereon, or whether there was asbestos present. Decision and Order at 13 n.9.

[9] Q: Do you have any information as to whether or not he was exposed to asbestos while he was working on the Queen Mary? A: No. Q: Are you familiar -- A: My speculation would be that he was, but that's just speculation. CX 6 at 46 (attorney's objection omitted).

Mr. Ay testified that he is familiar with the *Queen Mary* because he worked on it in 1969. He testified to an asbestos abatement project, probably in the 1960s or 1970s,[10] and to some retrofitting, but he stated that some original asbestos insulation still remains on the ship. Tr. at 88-92, 143. Mr. Ay testified that, while he knows there were contractors aboard the *Queen Mary* and that decedent was an insulator, he has no knowledge of when decedent worked on the ship, how long he worked there, where on the ship he worked, or what he did while working on the ship. Tr. at 141-143.

The administrative law judge specifically found that decedent's deposition testimony does not aid claimant in meeting her burden of establishing the working conditions element as decedent did not mention any exposure to asbestos on the *Queen Mary*. Decision and Order at 14. The administrative law judge also stated that claimant's own testimony does not meet her burden, as she does not allege decedent ever told her he was exposed to asbestos on the *Queen Mary*. Finally, the administrative law judge stated that Mr. Ay's testimony cannot establish how much asbestos was present during decedent's employ or where it was located, and it cannot establish whether decedent worked in proximity to it. *Id.* at 15-16.[11] The administrative law judge concluded that, while claimant's evidence suggests decedent might have been exposed to asbestos on the *Queen Mary*, there is no evidence to establish that decedent actually was exposed to asbestos. *Id.* at 16. Thus, he found Owens-Corning is not the responsible employer. *Id.*

We reject the contentions that the administrative law judge erred in not invoking the Section 20(a) presumption against Owens-Corning. While claimant need not definitively prove that the working conditions caused the decedent's harm in order to invoke the Section 20(a) presumption, *see, e.g.*, *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990), claimant must establish the existence of both the harm and the accident or working conditions that, she alleges, could have caused that harm. *Id.*; *see Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). In this regard, the Ninth Circuit stated that a claimant must present "some evidence tending to establish" exposure to asbestos during covered employment. *Albina*

[10] Mr. Ay stated later that abatement may have occurred in 1973 or 1974. Tr. at 143. The administrative law judge found that while there may have been asbestos on the *Queen Mary* when Mr. Ay worked there in 1969, it may have been removed before decedent worked there. Decision and Order at 15.

[11] The administrative law judge also noted that, while Dr. Hammar's report supports a finding of asbestos exposure during decedent's work life, it does not establish exposure on the *Queen Mary*. Decision and Order at 15-16; CX 40.

Engine, 627 F.3d at 1298, 44 BRBS at 91(CRT) (citing *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990)). The administrative law judge is entitled to determine the weight to be accorded to the evidence of record, to address the credibility and sufficiency of any testimony, and to make the choice among reasonable inferences. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Contrary to the arguments of Thorpe and the Director, the administrative law judge rationally found there is insufficient evidence to establish that decedent was exposed to asbestos while working for, and to invoke the Section 20(a) presumption against, Owens-Corning. Unlike *Albina Engine*, this case does not contain evidence from a contemporary co-worker or supervisor of decedent's, does not contain testimony from the decedent himself as to whether he thought he was exposed to asbestos at the *Queen Mary*, and does not contain evidence from the claimant beyond speculation as to whether decedent was exposed to asbestos at the *Queen Mary*. Further, the only witness asserting the actual presence of asbestos on the *Queen Mary*, Mr. Ay, did not know any details about decedent's employment or actual working conditions. Thus, while there may be "some" evidence that there *could have been* working conditions on the *Queen Mary* that *could have* caused decedent's disease and death, the administrative law judge acted within his discretion as fact-finder to find the evidence insufficient to invoke the Section 20(a) presumption against Owens-Corning. *See generally Ramsay Scarlett & Co. v. Director, OWCP*, 806 F.3d 327, 49 BRBS 87(CRT) (5th Cir. 2015); *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Kooley*, 22 BRBS 142.

The administrative law judge's finding that there is no evidence of covered Owens-Corning working conditions that could have caused decedent's asbestos-related disease is supported by substantial evidence. *See R.F.* [*Fear*] *v. CSA, Ltd.*, 43 BRBS 139 (2009); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). As claimant bears the burden of establishing the elements of a prima facie case, and as substantial evidence supports the administrative law judge's finding that she did not do so with respect to Owens-Corning, we affirm the administrative law judge's finding that Owens-Corning is not the employer responsible for claimant's benefits. Consequently, as he found the Section 20(a) presumption invoked against the earlier employer, Thorpe, and that finding is unchallenged on appeal, we affirm the finding that Thorpe is liable for claimant's benefits. *Albina Engine*, 627 F.3d 1293, 44 BRBS 89(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge